89-835

NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

ADRIAN ANTONIU

PETITIONER

V.

SECURITIES AND EXCHANGE COMMISSION

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THE PETITION FOR WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED

1. Whether a hearing preceding the taking of a protected right where the burden of proof is placed not on the agency but on the person affected; where the person affected is not a party to the proceeding and does not control the legal strategy; where the hearing results in a grant, not in a taking of rights; where the hearing is closed to the public and testimony not taken under oath -- meets constitutional requirements.

2. Whether in the case of biased administrative adjudications, the legal consequences attached to the appearance of impropriety should be identical to those attached to impropriety itself.

3. Whether a court of appeals vacating an administrative decision for prejudgment should, if the statutory language is plain and unambiguous, consider jurisdictional challenges properly raised before the court, before remanding to the agency for a de novo

review.

4. Whether in proceedings where the government seeks to deny or rescind protected rights, and remands for a de novo review ordered by the court because of lack of impartial tribunal, the applicant has crossed ipso facto the threshold to a Prevailing Party status under the Equal Access to Justice Act (EAJA).

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V.
SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR ADRIAN ANTONIU, PETITIONER

To the Honorable Chief Justice and Associates Justices of the Supreme Court of the United States:

Adrian Antoniu, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit entered in the above-entitled case on July 31, 1989.

THE OPINION BELOW

The opinion of the court below is unreported and is printed in Appendix A hereto, infra, pp. A-1 to A-17.

JURISDICTION

A timely petition for rehearing was denied on July 31, 1989. The jurisdiction of the Court is invoked under 28 USC 1254(1). The jurisdiction of the court below was invoked under 15 U.S.C. 78(y).

CONSTITUTION, STATUTES AND REGULATIONS INVOLVED

The Due Process Clause to the United States Constitution.

The Securities Exchange Act of 1934:

15 U.S.C. 78(c)(a)(39)

15 U.S.C. 78o(b)(6)

15 U.S.C. 78j(b) & 78ff

15 U.S.C. 78o-3(g)(2)

Rules:

17 C.F.R. 240.19h-1

Equal Access to Justice Act:

28 U.S.C. Section 2412 et seq.

NASD Bylaws:

Article I, Sections 2 (c) and 13 (c)

STATEMENT OF THE CASE

I. ABSTRACT

This appeal arises in review of two decisions of the Securities and Exchange Commission (SEC or Commission) and from a decision of the Court of Appeals for the Eighth Circuit. The first SEC decision reversed a decision of the National Association of Securities Dealers (NASD) favorable to petitioner and resulted in petitioner's loss of his employment and a de facto interdiction from association with a broker-dealer. The court below has affirmed this decision, finding the sanctions within the SEC's discretionary authority. Hereinafter, these proceedings are referred to as Antoniu I

The second proceeding, hereinafter referred to as Antoniu II, permanently barred petitioner's association with a broker or dealer, in effect precluding his employment in the securities business.

The court below reversed, finding one of the adjudicators had prejudged the case; the court remanded, with instructions that a de novo review of the evidence be undertaken, and that those proceedings in which the biased adjudicator participated be invalidated -- only if such proceedings took place after the delivery of the speech which disclosed the adjudicator's bias.

After the judgment of the court below, petitioner filed an application for attorney fees under EAJA. His request was denied for failing to achieve the status of a Prevailing Party.

II. BACKGROUND

On November 13, 1980, petitioner pled guilty to two counts of misappropriating information in the securities markets, in violation of 15 U.S.C. 78j(b) and 78ff. Four years later, he moved to Minnesota and accepted an employment offer from M.H. Novick. (Appendix A-4). Because of petitioner's

criminal conviction, M.H. Novick, the employer, sought approval for the proposed employment from his regulatory agency, the National Association of Securities Dealers (NASD).

On February 27, 1985, NASD held a hearing with the express purpose of determining the eligibility in membership of its member Novick if it employed petitioner as a registered representative. (Appendix A-19,20). At the outset of the hearing the NASD ruled that petitioner was subject to a statutory disqualification, and that it wished to take evidence on the application of M.H. Novick and make its recommendation as to the continuance in membership of M.H. Novick with petitioner in its employ. (Appendix A-19,20). The hearing was closed to the public, and testimony was not sworn. Most importantly, NASD announced that the burden of proof was placed upon Novick and petitioner. (Appendix A-23).

Nonetheless, as a result of this hearing, NASD, after a review of the record, decided to approve M.H. Novick's application to have petitioner in its employ; the decision was to become effective unless respondent, within thirty days, objected to that arrangement. Rule 240.19h-1(7) (Appendix A-86). The SEC did not take any adverse action within those thirty days but communicated that it would extend the period of consideration of NASD's action for an additional sixty days.

As permitted by SEC's regulations, petitioner and Novick agreed to begin their association. The court below noted that "Antoniu went to work for Novick later that summer." (Appendix A-4).

Finally, on September 3, 1985, the Commission took action: it vetoed NASD's approval of petitioner's employment. (Appendix A-4). Respondent held no hearing, either before or after taking that action. One of the adjudicators was Commissioner

Charles C. Cox.1/

On September 19, 1985, respondent started a second set of proceedings against petitioner (hereinafter referred to as Antoniu II) this time to determine whether petitioner should be excluded from any employment in the securities business. (Appendix A-4,5). One of the participating commissioners was Charles C. Cox.

Ultimately, the Commission decided, on December 3, 1987, to impose a permanent bar respecting petitioner's employment in the securities business. This action was taken although petitioner was not associated with a broker or dealer and the pertinent statute at that time permitted such result only against

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1/The decision to overrule NASD's approval addressed issues never considered by NASD: that petitioner was still on probation, that petitioner had engaged in a sophisticated scheme to elude surveillance, that it was not in the public interest to permit petitioner in the securities business (Appendix A-41); whereas the only question before NASD was the continued admission of one of its members, Novick, with petitioner in its employ. (Appendix A-19,20).

"persons associated or seeking association with a broker or dealer." (Appendix A-84). On the following day, Congress passed the Securities and Exchange Commission Authorization Act. December 4, 1987, Sec. 317, Pub. Law 100-181, 101 Stat. 1249. Therein Congress expanded the pertinent law which now permits sanctions against

> "any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with a broker or dealer...." (Appendix A-90). (emphasis added).

The amended statute, expanded the class of persons subject to SEC's jurisdiction under Section 15 (b)(6) authorizing now proceedings against person, who, like petitioner, had been in the securities business, or sought such employment at the time of the misconduct (Appendix A-90). This amendment was applied retroactively in our case.

While the Antoniu II case was pending before the Commission, Commissioner Cox

denounced petitioner in a public speech, stating that the Commission had already decided to impose against petitioner a permanent bar from employment in the securities industry. The court below found the speech amenable to one interpretation only: that Commissioner Cox had prejudged the issue then pending before him (Appendix A-6,7). The court noted that the text of the speech was also printed and distributed by SEC (Appendix A-7) and that Commissioner Cox and the printed booklet declared "In the case of Mr. Antoniu, his bar from association with a broker-dealer was made permanent." (Appendix A-6, emphasis in original). The court did find Commissioner Cox had adjudged the facts as well as the law of the case and nullified only the proceedings subsequent to the speech in which Cox participated. (Appendix A-17); and it remanded to the Commission for a de novo review without Cox's participation. (Appendix A-17).

Petitioner requested a rehearing, arguing: that the date of the speech was irrelevant, and that Commissioner Cox's participation in both cases, and especially in Antoniu II must be invalidated, whether prior or subsequent to the delivery of the speech. Petitioner also urged the court to invalidate the Antoniu I decision for violation of due process, as it was taken without a pre-deprivation or post-deprivation hearing. The court denied petitioner's application on July 31, 1989. (Appendix A-72).

Finally, petitioner filed an application for attorney fees, based on his success in the Antoniu II proceedings. The court below denied the application without prejudice, holding that the petitioner has not shown at this time that he is the prevailing party. (Appendix A-74).

ARGUMENT

I. THE COMMISSION'S PROCEDURES EMPLOYED IN Antoniu I DO NOT COMPORT WITH

CONSTITUTIONAL REQUIREMENTS.

A. Property Rights: the SEC Took Petitioner's Contract Employment Right and License Right Without Affording Him Even a Post-Deprivation Hearing.

The court below found,

> "In 1984, Antoniu moved to Minnesota to take a job with M.H. Novick. Due to Antoniu's criminal conviction, Antoniu and Novick sought approval for the employment from the National Association of Security Dealers (NASD). After an evidentiary hearing, NASD approved the employment on June 3, 1985. Antoniu went to work for Novick later that summer. On September 3, 1985, the SEC vetoed NASD's approval of that particular employment." (Appendix A-4).

However, this "veto" was neither preceded nor followed by a hearing before the SEC. Although petitioner has briefed this fundamental infirmity (Brief for petitioner, 28-35), the court found this issue not to merit its attention.

The position of the court below is in conflict with prior Eighth Circuit and Supreme

Court precedents. In Moore v. Warwick Public School Dist. No. 29, F.2d 322, 326, (8th Cir.) the court held that employment contracts are protected property rights and that the due process clause required that deprivation of property be preceded by notice and opportunity for hearing Moore, p. 326. Even more troubling is the departure from the Supreme Court precedent: In Moore the Eighth Circuit followed the road map outlined in Mathews v. Eldridge, 424, U.S. 319, 335 (1976):

> "Identification of the specific dictates of due process generally requires consideration of three factors; first, the private interest that will be affected by the official action; second, the risk of a erroneous deprivation of such interest through the procedures used...; and finally, the Government's interest, including... administrative burdens that the additional or substitute procedural requirement would entail." Mathews, 335

Then the court reaffirmed the principle, "...some form of hearing is required before an individual is finally deprived of a property right." Mathews, 333. In the instant case,

the court below appears to have sanctioned petitioner's deprivation of protected employment rights without any kind of hearing.2/

It seems the Commission and the court below have taken the view that subsequent to creating a protected right, a hearing is not required unless mandated by the statute which authorized the creation of the right. This Court, however, starting with Cleveland Board of Education v. Laudermill, 470 U.S. 532, explicitly rejected the "bitter with the sweet" approach:

> "The point is straightforward: the due process clause provides that certain substantive rights -- life, liberty, property -- cannot be deprived except pursuant to constitutionally adequate procedures. The right to due

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2/The hearing before the NASD, discussed below, was a hearing by a non-governmental entity, to which petitioner's employer, not petitioner himself, was the applicant, a hearing in which the burden of proof was placed not on the government but on petitioner, a hearing which took no sworn testimony and which granted, not denied petitioner employment and license rights.

> process is conferred not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property right... it may not constitutionally authorize the deprivation of such an interest, once conferred, without adequate procedural safeguards." Cleveland, 541, citation omitted.

And if the Due Process Clause applies, the need for some form of pretermination hearing is evident. Cleveland, 542.

Thus, the SEC's creation of property rights (by permitting petitioner's employment with Novick) does not connote a corresponding SEC right to extinguish what it had created at will, in our case by a veto, without any form of hearing.3/

3/Even if "something less" than a full evidentiary hearing is sufficient for Antoniu I purposes, the essential requirements of due process always demand (a) notice and (b) an opportunity to respond. Cleveland, 546. As we will show below, in Antoniu I petitioner was afforded neither.

The Commission argued, and apparently the Court of Appeals agreed, that the hearing before the NASD held on February 27, 1985, qualifies as the hearing envisioned by Mathews.

B. The NASD Hearing Falls Short of Constitutional Requirements.

A brief review of the NASD hearing shows that it was unsatisfactory not in one, but in all possible respects:

First, the hearing was set out "for the purpose of determining the eligibility of M.H. Novick & Co., Inc... to continue in membership in the Association with Adrian Antoniu in its employ....," not for the purpose of imposing sanctions on petitioner. (Appendix A-19,20).

Second, the proceeding was the result of an application made to NASD by Novick, not by petitioner. ((Appendix A-20), Article I, sec. 13(c) of the NASD Bylaws (Appendix A-88)).

Third, the proceeding did not inquire whether petitioner was under a statutory disqualification , but started its work from this premise: "Mr. Antoniu is subject to a statutory disqualification as a result of his conviction... for misappropriating non-public information...." (Appendix A-20). The

burden of proof was placed squarely and explicitly on petitioner, not on the government. (Appendix A-23).

Fourth, petitioner could not challenge this premise because it was not his application, and he had no control over the legal strategy.

Fifth, the strategy used before NASD by petitioner's employer was, (since the panel was constituted of two non-lawyers, the proceedings were closed to the public and testimony not taken under oath) not to challenge the legal requirements of the statutes or NASD's jurisdiction, but to show indicia of rehabilitation.4/

4/Petitioner believes he was not subject to NASD's or SEC's jurisdiction because: (a) petitioner is said to have defrauded a corporation by stealing confidential information. But the corporation seems to be as much a sinner as sinned against: in the 60 days preceding the public announcement of the merger, corporate insiders engaged in heavy trading of the common stock, for their personal gain, and without public disclosure. (Pet App. 48a-53a) If so, the corporation violated its legal obligation to disclose the very same information

(continued...)

Sixth, one record and one issue were presented before NASD, another record and another issue were presented and decided by SEC. (Appendix A-25 through 34).

This type of hearing, whatever other legitimate functions it might have, cannot pass any constitutional test in the context of taking protected rights.

Constitutional, not statutory considerations, mandate a hearing in Antoniu I, because, "The constitutional requirements of procedural due process of law derives from the

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4/(...continued)
Antoniu has misappropriated. Since petitioner could not have stolen a secret which shouldn't have been a secret (as a result of corporate mischief) the whole premise for SEC's enforcement action may be defective. Cf. Basic. Inc. v. Levinson, 108 S. Ct. 978, 989. Under the fraud on the market doctrine, whatever petitioner "stole" should have been available to the whole world -- certainly not protected as confidential by the government. This argument is presented herein to show one issue petitioner could not advance in the NASD hearing; and (b) Petitioner pleaded guilty to two counts of misappropriating non-public information. 15 U.S.C. 78(j)(b). This offense is not a predicate for the SEC's action under Section 15(b)(4)(B) of the Exchange Act.

same source as Congress' power to legislate." Wong Yang Sung v. McGrath, 339 U.S. 33, 49. And a simulacrum of a hearing will not do: "When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality." Wong, 50.

This Court held that a denial of a hearing was lack of constitutional due process, that a hearing inconsistent with the Administrative Procedure Act violates due process requisites even when the statute does not explicitly require a hearing. Constitutional, not statutory considerations, required a hearing in Antoniu I, the type of hearing prescribed by the Administrative Procedure Act. Wong, 33. See also Riss & Co. v. United States, 341 U.S. 907, 71 S.Ct. 620, 95 L.Ed. 1345, decided on the authority of Wong.

There is no question that the NASD "hearing" does not meet constitutional requirements respecting due process, nor is

there much doubt that the Court of Appeals erred in affirming the SEC's order: there is, however, considerable doubt whether this parody of a hearing is sufficient for a grant of certiorari.

Petitioner believes that it is. Historically, there has been a relaxation of the early standards required to meet due process requirements in administrative tribunals. The phrase, "some form of a hearing," remains a requirement but its content has been gradually diluted. The "hearing" described above is without doubt "some" form of a hearing -- a farcical form.

The Court should seize upon this deformed hearing as an opportunity to draw a "bright line." That such a travesty of a hearing could take place and survive appellate review, shows a bright line should be drawn to set some boundaries of "some form of the hearing" in the context of administrative adjudications. Petitioner hopes that this

case is the appropriate vehicle for this undertaking.

II. THE COURT BELOW HAS FAILED TO DISTINGUISH BETWEEN APPEARANCE OF IMPROPRIETY AND IMPROPRIETY ITSELF.

The appearance of impropriety generated by an extra- judicial speech should require invalidation of judicial acts subsequent to the delivery of the speech; impropriety itself, however, requires invalidation of all tainted judicial acts.

The court below held, "Cox's words describing Antoniu's bar as permanent can only be interpreted as a prejudgment of the issue." (Appendix A-6,7). That is, not appearance of bias but bias itself.

A conceptual distinction should be made between "bias," a temporal phenomenon susceptible of observation and description and "appearance of bias," a noumenon, which can be known by intuition or inference.

In the instant case, bias itself, as

a phenomenon, is present: Cox announced the sentence and the verdict before the SEC's hearing even began. Cox's speech did not prejudge the agency's decision; the speech merely revealed (provided the evidence) that the matter had been prejudged. The distinction is fundamental. If the speech itself prejudged the matter, then only the participation subsequent to that speech violates due process; if the speech demonstrates prejudgment on the part of an adjudicator, then his entire participation, whether prior to or following the speech, should be invalidated. This is the case when, as here, at issue is not merely "the appearance of fairness and justice" but fairness and justice themselves.

In our case, the Court decided that it,

> "...can come to no conclusion other than that Cox had 'in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'" (Appendix A-17).

Thus, this case is a matter of judicial

impropriety -- not of appearance of impropriety. As such, it makes no sense to distinguish Cox's participation -- invalidating his participation after the speech, but validating his participation before giving the speech. In fact, delivery of the speech itself is the only positive and fair event, in that it revealed to petitioner the bias of the adjudicator and afforded him an opportunity to seek relief; the disclosure of bias must be encouraged not penalized. Without the speech the request for disqualification could not have been made. And once the court found Cox to have been a biased adjudicator, the only relevant issue, respecting time, is when did he prejudge the issue, not when he announced it to the world.

This assertion can be tested logically as follows: let us suppose the bias disclosing speech was given after the decision has been filed; according to the reasoning of the court below the decision in this case would have

been sustained because it followed, not preceded the speech; and petitioner would be left without any remedy! To sum up, unlike appearance of bias cases where at stake is the legitimacy of the tribunal and where the decision reached may be unbiased, in pure bias cases (such as the instant case) the virus of bias inexorably contaminates every aspect of the proceeding, and no segment of it can survive untainted.

Therefore, Cox's participation should be voided, including his participation in the Antoniu I decision of September 3, 1985, and encompassing Cox's entire participation in the Antoniu II order, whether before or after the delivery of the speech (including his participation in the order of September 19, 1985, which instituted the second set of proceedings); the taint, no matter when disclosed, had preceded and infected the

origination of proceedings.5/

A. When Did Commissioner Cox Prejudge the Issue, and the Relevancy of This Question in Antoniu I.

The court opinion notes: "...the government asserts Antoniu II encompasses Antoniu I." (Appendix A-5, fn. 2). Petitioner agrees. If so, the prejudgment of Antoniu II suggests prejudgment of issues in Antoniu I, since we do not know when Cox had adjudged the issues. Petitioner cannot provide an answer, but the SEC is wholly accountable for petitioner's ignorance. As the court notes,

> "Following Cox's public denouncement of him, Antoniu made multiple requests in the administrative proceedings for permission to develop the record on the issue of bias. His requests were denied."

5/If only the appearance of prejudgment were in issue, the date of the speech would be pertinent, because it would be the date when the appearance was first conveyed.

(Appendix A-7).6/

The principle of a fair trial by a impartial adjudicator is not merely a precious right but the cornerstone of all juridical rights. In considering administrative adjudicators, the courts have placed upon them the same obligations traditionally placed upon judges, and, contrary to the opinion of the court below, have invalidated biased proceedings from the moment "bias raises its ugly head." This principle was enunciated as

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6/Thus, many questions remain unanswered: was this Cox's only speech disclosing his bias? When was it drafted? Did other commissioners make similar statements? When did Cox reach the conclusion that petitioner is an "indifferent violator"? Above all, was he then expressing the Commission's bias, as the speech suggests, or only his own? If the answer to the last question is "Yes," then the qualifications of the agency itself should be re-evaluated.

This is no idle speculation. The revealing speech was not only given in Denver, but published at a later date by SEC: "The text of the speech was also printed and distributed by the SEC." (Appendix A-7). The Court does not seem to attach any significance to this event. Yet this is a major disqualifying event, because it suggests that the SEC itself endorsed Cox's speech or shared in its bias against petitioner.

follows:

> "A fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any difference, the rigidity of the requirement that the trier be impartial... applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed, administrative efficiency been relaxed... for when the fault of bias and prejudice in a judge first raises its ugly head, its effect remains throughout the whole proceeding." N.L.R.B. v. Phelps, 5th Cir., 1943, 136 F.2d 562, 563-564 (emphasis supplied).

By invalidating only the "post-speech" adjudications the court below is in conflict with the law of the Fifth Circuit.7/

7/Petitioner wishes to add an additional challenge, based on violations of the Equal Protection Clause. After judgment was entered the SEC made an agreement with Drexel, Burnham, Lambert (Drexel), whose chairman is Mr. Shad, a former chairman of the SEC, by which terms no enforcement action is to be taken against Drexel. This astonishing decision was taken

(continued...)

B. Conflict with the Practice of Other Courts and with Teachings of the Supreme Court.

The court below cited with approval the resolution of a similar matter by the Tenth Circuit. Staton v. Mayes, 552 F.2d 908 (10th Cir.) (as amended), (cert. denied) 434 U.S. 907 (1977). In that case prejudicial statements had been also made in extra-judicial speeches by adjudicators. Yet, the Tenth Circuit chose to invalidate the proceedings in their entirety, directing that the Board could make new findings of fact if it so desired. Staton, 915 (Appendix A-12,13). The court below, in deciding to

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7/(...continued)
notwithstanding Drexel's conviction for one of the largest securities fraud cases ever.

The issue petitioner wishes to put before the Court, if the merits are reached, is whether the government is acting with an even hand in enforcement action by prosecuting Antoniu for a comparatively minor offense which took place in the 1970's but forgiving action against corporate offenders, especially those matching staggering offenses with staggering clout. Plainly put, whether the "tough but fair cop" is tough with Antoniu but fair with Drexel.

invalidate only findings subsequent to the offending speech, is in direct conflict with the practice adopted by the Tenth Circuit in Staton.

The Court of Appeals for the D.C. Circuit had also considered the consequences of a participation by a disqualified SEC commissioner in an adjudication. Amos Treat v. S.E.C. 306 F.2d 260 (1962). The court, although permitting the reinstitution of new proceedings, reversed the entire proceedings, including the order which instituted them. The court below, in leaving intact the instituting order in Antoniu II (in which Commissioner Cox had participated), is also in conflict with the practice of the D.C. Circuit.

This Court has recently examined the proper timing for an adequate recusal by disqualified federal judges. In that context, the Court held that a judge should recuse himself as soon as he obtained knowledge of

the disqualifying condition. Liljeberg v. Health Services Acquisition Corp., 108 S. Ct. 2194, 2201 (1988). Similarly, where disqualification is required for actual bias, the affected judge should recuse himself as soon as he "obtains actual knowledge" that he prejudged the issue.

In our case the Commission concedes that it does not know when Commissioner Cox recused himself, because no certificate of recusal has ever been filed (Appendix A-79, emphasis added), nor were the parties informed of this private recusal.8/

Moveover, the record shows, in the light

8/Having blazed this bizarre procedural path, the Commission now asks petitioner to take on faith the dubious proposition that "this recusal preceded any adjudication by the Commission." (Appendix A-78, emphasis added). This is an unfair request.

Neither petitioner nor the Commission have been told that the major judicial event, a disqualification, took place. Petitioner cannot but wonder not only when, but whether this clandestine recusal ever occurred: since the record of the proceeding is the only memorial of what did, or did not, occur, petitioner disputes the legitimacy of this sub-rosa disqualification.

shed by the extra-judicial speech, that Commissioner Cox was not only biased but that he had actual knowledge of his bias. The proper remedy under Liljeberg, in view of Commissioner Cox's actual knowledge of his prejudgment is invalidation of each and every action in which he participated in the Antoniu I and Antoniu II proceedings. Thus, the partial invalidation directed by the court below conflicts with the teaching of this Court.

III. THE COURT OF APPEALS, PRIOR TO REMAND, SHOULD HAVE CONSIDERED PETITIONER'S JURISDICTIONAL CHALLENGE REGARDING THE INTERPRETATION OF SECTION 15 (b)(6) OF THE ACT.

A. Adrian Antoniu Was Not Associated, or Seeking Association, with a Broker-Dealer When Proceedings in Antoniu II Were Instituted.

Petitioner has not participated in the securities business since 1978, and has no

plans to enter this industry today.9/ Although outside of any securities business for the last eleven years he has been forced to defend himself against SEC charges for the last four.

The following facts are not in dispute: the Commission's Order in Antoniu II, predicates its jurisdiction on petitioner's past association, between August 1972, through July 1978, to be exact, with broker-dealers. Order Instituting Proceedings. (Appendix A-45).10/ The statute, under which SEC acted, read, before the December 4, 1987, amendment, as follows:

> "The Commission, by order, shall censure or place limitations on the activities or functions of any person associated, or seeking to

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9/Petitioner's association with Novick, was quite brief and terminated by the Antoniu 1 order. Petitioner had no involvement at all in the securities business during that period.

10/There is nothing in the Order to suggest that Antoniu's application six years later, in 1984, to work in the securities business had anything to do with the proceedings.

become associated, with a broker or dealer.... if the Commission finds, on the record, after notice and opportunity for hearing... that such person has... been convicted of any offense specified in subparagraph (B) of said paragraph (4) within ten years of the commencement of the proceedings under this paragraph...." 15 U.S.C. Sec. 78o-(6) (emphasis supplied)

Over the course of this litigation, the Commission has claimed it had jurisdiction over petitioner because the phrase, "associated or seeking to become associated," should be construed as denoting "associated or seeking to become associated, or at the time of the alleged misconduct associated or seeking to become associated."

Petitioner disagrees: it was not until December 4, 1987, one day after the Antoniu II Order issued (December 3, 1987), that Congress voted this change adopting SEC's recommendation. Securities and Exchange Commission Authorization Act December 4, 1987, Sec. 317, Pub. Law 100-181, 101 Stat. 1249. Therein, Congress expanded the pertinent law

which now permits sanctions against "any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with a broker or dealer...." (emphasis added, Pet. App. 47a). But this disposition is prospective, of course, and does not apply to the proceedings at bar.11/

11/The Senate Report accompanying the legislation, reciting from then Chairman Shad's testimony, had this to say on the state of affairs preceding this enactment:

> "This phrasing [the old law under which SEC issued its bar against Antoniu] creates a possible ambiguity, however. It raises the possibility of an argument [precisely the argument raised by Antoniu] that a person who was associated with a broker-dealer... at the time of the violation, but who is no longer so associated at the time of the bringing of an administrative proceeding could not be subject of such a proceeding. It also raises the possibility of an argument that someone who was seeking to become associated with a broker-dealer..., but is not seeking such association at the time of the administrative proceeding, cannot be subject of the proceeding.... The proposed amendments correct this potential (continued...)

B. The Court Below Should Have Considered Petitioner's Contention That the Proceedings Are Void for Lack of Jurisdiction.

The direct teachings of the Supreme Court in Chevron are controlling:

> "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron U.S.A. v. Natural Resources Defense Council,

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11/(...continued)
problem by inserting, in sections 15 (b)(6), the phrase 'or, at the time of the alleged misconduct, associated or seeking to become associated.'" S. Rep. No. 105, 100th Cong., 1st Sess. 23 (1987)

On the strength of this dubious subsequent legislative history, the Commission bases its proceedings against petitioner.

467 U.S. 837, 842-843.12/

If, and only if the statute is silent or ambiguous,

> "...the power of an administrative agency to administer a congressionally created... program necessarily requires the formulation of policy and making of rules to fill any gap left, implicitly or explicitly, by Congress." Chevron, at 843, quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974).

This case, however, is a Chevron Step 1 affair: the language of the statute was plain and unambiguous; not only were there no gaps left to be filled by the agency but Congress explicitly had, in 1975, narrowed the class of individuals subject to disciplinary proceedings under 15 U.S.C. 78o(b)(6) from "any person" before the 1975 amendment, to the

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12/Thus, the legislative history relied on by the SEC is the verbatim recitation of Chairman Shad's testimony given before Congress on May 13, 1987. This manufacturing of legislative history surpasses Justice Scalia's concern over the insertion of cases at the suggestion of a lobbyist; it is legislative history created by the lobbyist himself.

restrictive clause "persons associated or seeking association with a broker-dealer" thereafter. Far from being ambiguous, the language of Section 15 (b)(6) was quite clear, and left no gap or crevice to be filled by the regulatory agency.

Only on December 4, 1987, Congress decided to expand the statute, permitting proceedings against individuals associated or seeking association with a broker-dealer at the time of the alleged misconduct. Petitioner's case, however, was decided one day earlier, on December 3, 1987, and the more inclusive amendment should not apply.

This Court firmly rejected the usurpation by an agency of legislative powers:

> "The rulemaking power granted to an administrative agency... is not the power to make law. Rather, it is the power to... carry into effect the will of Congress as expressed by the statute." Ernst & Ernst v. Hochfelder 425 U.S.185, 213-214.

The Commission cannot free itself of statutory constraints merely because it

decides, on its own, to do away with a perceived ambiguity: "The starting point in every case involving construction of a statute is the language [of the statute] itself." Blue Chip Stamps v. Manor Drug Stores 421 U.S. 723, 756. In our case, where the language is plain, the language of the Section 15 (b)(6) is the starting and the finishing point of construction: petitioner is not a person that can be disciplined under the statutory provision applicable when the proceedings commenced. Petitioner contends that in cases involving construction of a statute where the language is plain and unambiguous the courts should decide the statutory challenge before remanding for due process violations.13/

13/The SEC lacks jurisdiction under its own regulations to take enforcement action under 17 C.F.R. 240.19h-1 (7). The court below found: "NASD approved the employment on June 3, 1985. Antoniu went to work later that summer." (Appendix)

The Commission's own Rule 19h-1 (7) plainly provides that in such situations the Commission will not start enforcement action based on the same disqualifying event. The court should have considered this argument prior to remand.

IV. WHEN THE AGENCY SEEKS TO EFFECT DEPRIVATION OF PROTECTED RIGHTS, AND WHEN AGENCY'S ACTION IS VACATED AND REMANDED FOR DE NOVO REVIEW AS A RESULT OF PROVIDING A BIASED TRIBUNAL, PETITIONER HAS SATISFIED THE REQUIREMENTS FOR A "PREVAILING PARTY" UNDER THE EQUAL ACCESS TO JUSTICE ACT.

A. Petitioner Is a Prevailing Party.

After the court below reversed and remanded, petitioner filed an application for attorney fees under EAJA. The court below denied the application without prejudice: "...since it has not been determined that the appellant at this time is a prevailing party." (Appendix A-74).

Petitioner believes this finding is in error. The government, and seemingly the court below, rely on decisions reached by courts in Social Security cases where fee applicants seek, after remand, certain monetary benefits. Petitioner, on the other hand, sought from the Commission only his

right to an impartial and fair tribunal. This "benefit," the most fundamental of all benefits, he received as a result of nearly four years of litigation when the court below vacated a biased decision reached by a biased tribunal. The government's view, apparently, is that "benefits" signify tangible receipts only. This is a too meager view of the congressional intent inherent in EAJA: the benefit won by petitioner, i.e., the right to a fair tribunal is of greatest significance, and in that respect he has entirely succeeded.

As such, the SEC's reliance on Sullivan v. Hudson, 109 S.Ct. 2248, 2255 (1989) is misplaced. In Sullivan the Court stated:

> "...[a] court's remand to the agency for further administrative process does not necessarily dictate the receipt of benefits, the claimant will not normally attain "prevailing party" status... until after the result of the administrative process is known". Sullivan, supra, 2255. 2251.

But Sullivan was a case where petitioner sought benefits from the government, not where the government sought to deprive petitioner of protected rights.

Instead, the controlling law is laid out in Texas State Teachers Association v. Garland Independent School District, 109 S.Ct. 1486 (1989). In that case the Court wrote the definitive book on Prevailing Party, in the context of all federal fee shifting statutes. Writing for a unanimous Court, Justice Sandra Day O'Connor stated: "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship in a manner which Congress sought to promote in the fee statute." Texas State, at 1493.

The clear requirement for crossing the threshold to Prevailing Party status is to succeed on "...any significant issue in litigation which achieved some of the benefit the parties sought in bringing suit...." Texas State, at 1493, citation omitted.

B. Significant Issues on Which Petitioner Prevailed.

Since the government and the court below have not recognized the significant issues on

which petitioner prevailed, I will outline them:

1. Before His Appeal, Petitioner Litigated His Case in a Biased Tribunal. After His Appeal, It Is Hoped That the Tribunal Will Hold the Balance "Nice, Clear and True."
2. Before His Appeal, Petitioner Was Banned From the Securities Business by an Unfair Tribunal. Today He Is Not.

Other courts have not hesitated to recognize the right of applicants to attorneys fees under the Equal Access to Justice Act, 28 U.S.C. Sec. 2412 et seq., after remand, where the government sought deprivation of rights. The Court of Appeals for the Tenth Circuit has decided in the case of a person against whom the Immigration and Naturalization Service (INS) instituted deportation proceedings, proceedings vacated and remanded to the agency

for an ultimate determination of certain issues.

INS opposed the fee application on the same grounds as the court below ruling, that the applicant was not yet a prevailing party. 28 U.S.C. sec. 2412 (d)(1)(A). The court overruled INS's objection, finding that avoidance of immediate deportation, quite apart from the ultimate conclusion, constitutes a substantial victory to warrant a fee award. Kopunec v. Nelson, 801 F.2d 1226, 1229. The case at bar is analogous, in that petitioner has avoided an administrative bar imposed unjustly, and his is a substantial victory as well. Thus, there is a conflict between the court below and the Tenth Circuit respecting the interpretation of the Prevailing Party concept, in non Social Security cases.

C. Unlike the Social Security Cases on Which the SEC Relies, Petitioner Is a Defendant in a Government Action.

Petitioner does not seek any benefits -- just his constitutional right to be let alone. Thus he should not be expected to compel the government to recommence proceedings against him as a precondition to recapturing his attorney fees. The view espoused by the government and the court below amounts to deterring resisting unjust government action -- instead of deterring unjust government action: a complete reversal of the congressional intent. Indeed, according to the logic of the government, petitioner would have to proceed against himself if the agency so chooses, by neglect or ill-will, to let the case linger in the limbo of remand forever.

Perhaps petitioner could seek a writ to reconvene the proceedings against him. In this scenario, petitioner is expected to play Russian roulette, risking significant protected rights and liberties for a chance at recapturing attorney fees. (petitioner may well lose if the government position was

substantially justified!)

A most imprudent bet, indeed. Needless to add, no person aggrieved by government action would, nor should, choose this reckless gamble, where the losing stakes are incomparably higher than the winning stakes, and no attorney would, or should, encourage such a person to attempt to get a refund of attorney fees. Such gallant or foolhardy counsel would deservedly expose himself to malpractice or disciplinary action should his client lose significant liberties when the last judicial curtain comes down.

This odd view of the EAJA purpose is possible because the government, refuse to abandon the "central issue" concept, because it knows that it, alone, controls whether the "central issue" will ever be reached. The government's interpretation, if sanctioned, might also give government an incentive to litigate instead of negotiate -- not in furtherance of a legitimate government purpose

but solely to avoid compliance with EAJA provisions.

Since Texas State, however, the search for the "central issue" (or for "the Holy Grail," as the Court put it) was deemed abandoned, to be replaced by success on any issue of significance. And the unanimous Texas State Court clearly envisioned fee applications pendente lite:

> "Congress cannot have meant 'prevailing party' status to depend entirely on the timing of a request for fees: a prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought, either pendente lite or at the conclusion of the litigation." Texas State, at 1492, my emphasis.

The court below is thus in conflict with the law of the Supreme Court.

D. Petitioner Is Appearing Pro Se As a Result of Denial of the Fee Application.

The scenario outlined above is not hypothetical. Petitioner is appearing pro se before the Court not by choice, but because he

cannot secure representation. Four years of resisting government litigation, now vacated, have depleted him financially.

Petitioner has served his private attorney general role well, vindicating and promoting the right of those choosing to resist the awesome power of government agencies, to a fair and impartial tribunal; however, as an individual of insubstantial resources, he cannot go on litigating the merits on remand, or before this Court, unless his application is granted. Yet the EAJA was adopted as a remedy to this very problem:

> " ...that certain individuals... may be deterred from seeking review of, or defending against unreasonable action because of the expense involved in securing the vindication of their rights.... The purpose of this bill is to reduce the deterrents... by [awarding] attorney fees, expert witness fees, and other expenses against the United States, unless the Government action was substantially justified." H.R. Rep. No. 96-1418, 96th Congress, 2d. Sess. 5-6, reprinted in 1980 U.S. Code Congress. Ad. News 5943, 5984.

The Senate Report expressed the same

concern:

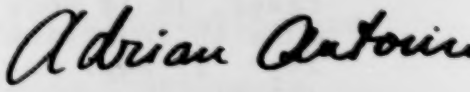
> "For many citizens, the costs of securing vindication of their rights and inability to recover attorney fees preclude resort to the adjudicatory process.... In these cases, it is more practical to endure an injustice than to contest it." S. Rep. No. 96-253, p.5 (1979).

This is exactly the case at bar, where the government, demonstrably unjustified in its actions toward petitioner, attempts and succeeds, by resisting the fee application, to prevail economically where it failed judicially. The court below's interpretation conflicts with the intent of the EAJA and with the law of Texas State.

CONCLUSIONS

Petitioner respectfully requests that a writ of certiorari issue.

Respectfully submitted,



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